ORIGINAL

BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

MIKE GLEASON, Chairman
WILLIAM A. MUNDELL
JEFF HATCH-MILLER
KRISTIN K. MAYES
GARY PIERCE

In the matter of: MARK W. BOSWORTH and LISA A. BOSWORTH, husband and wife; STEPHEN G. VAN CAMPEN and DIANE V. VAN CAMPEN, husband and wife; MICHAEL J. SARGENT and PEGGY L. SARGENT, husband and wife; ROBERT BORNHOLDT and JANE DOE BORNHOLDT, husband and wife; MARK BOSWORTH & ASSOCIATES, L.L.C., an Arizona limited liability company; 3 GRINGOS MEXICAN INVESTMENTS, L.L.C., an Arizona limited liability company; Respondents.	DOCKET NO. S-20600A-08-0340 **RESPONSE TO RESPONDENTS VAN CAMPEN'S MOTION TO QUASH SUBPOENA** (Assigned to the Honorable Marc E. Stern)

The Securities Division ("the Division") of the Arizona Corporation Commission ("the Commission") hereby responds to Respondents Van Campen's ("Van Campen") Motion to Quash Subpoena ("the Motion") and requests that it be denied. This Response is supported by the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

The Motion, in which Van Campen asks the Administrative Law Judge to quash the Division's subpoena, should be denied because 1) Van Campen cannot show that he is faced with a real and substantial risk that his compliance with the Division's subpoena might tend to convict him of crime and 2) his blanket assertion of the privilege against self-incrimination, when it is not at all clear that the subpoena seeks testimony incriminating him, is wrongful.

The U.S. Supreme Court's recent decision in *Chavez v. Martinez* holds that questioning a suspect without reading him his *Miranda* rights or other coercive police interrogations alone do not violate the Fifth Amendment. *Chavez v. Martinez*, 538 U.S. 760 (2003). It is not until the state attempts to use compelled testimony in a criminal case that the privilege against self-incrimination – which is a trial right – is violated. The witness "must be faced with real and substantial risks." *State v. Mills*, 995 P.2d 705, 713 (Ariz. Ct. App.1999), *rev. denied*, Feb. 8, 2000. If, **and only if**, the judge concludes there is a reasonable basis that the answers might tend to convict the witness of crime, the court must uphold the privilege. *State v. Cornejo*, 677 P.2d 1312, 1315 (Ariz. Ct. App. 1983), *rev. denied*, Mar. 13, 1984.

Van Campen says that he is the subject of two criminal investigations and he would like the Administrative Law Judge to believe this because he says it is so. This can be neither confirmed nor denied. What can be confirmed, however, is that Van Campen is **NOT** the defendant in any criminal case, he does **NOT** face criminal charges, and he has **NOT** been indicted. Moreover, Van Campen has not been subjected to questioning or other coercive police interrogations; he's only been served with the subpoena. Thus, Van Campen cannot show that he is faced with a real and substantial risk that his compliance with the subpoena might tend to convict him of crime.

The Division acknowledges that, with respect to discovery in non-criminal cases, a person may invoke the Fifth Amendment and assert the privilege against self-incrimination to justify a refusal to produce documents. However, the invoking person may **NOT** make a blanket

assertion of the privilege when it is not at all clear that the subpoena seeks testimony incriminating him. As discussed above, Van Campen has made the blanket assertion of the privilege against self-incrimination when it is not at all clear that the subpoena seeks testimony incriminating him

The privilege cannot be claimed in advance of questions actually propounded. *Thoresen v. Superior Court*, 461 P.2d 706, 711 (Ariz. Ct. App. 1969). Thus, it is well established that one may not rely on a blanket assertion of the privilege against self-incrimination unless each question clearly seeks testimony incriminating the declarant asserting the privilege. *State v. Ott*, 808 P.2d 305, 312 (Ariz. Ct. App. 1990), *rev. denied,* April 23, 1991; *Thoresen,* 461 P.2d at 711; *State v. McDaniel,* 665 P.2d 70 (Ariz. 1983) (blanket assertion allowed only where clear that any examination will involve risk of incrimination).

The trial court or, in this case, the Administrative Law Judge is faced with a two-step process: first determining whether the person asserting the privilege may face personal criminal liability and then ensuring that the person is not permitted to go beyond the scope of the privilege and assert it improperly. Permitting a blanket assertion where it is improper to do so in effect wrongly allows the person asserting the privilege to shift the burden of proof to the prosecutor or other person asking the question. That is also why one cannot rely on the privilege as a reason for refusing to attend a deposition – the privilege is to be asserted as to each individual question. *State ex rel. Romley v. Sheldon,* 7 P.3d 118 (Ariz. Ct. App. 2000), *rev. denied,* Dec. 5, 2000.

Based on the foregoing, it is apparent that 1) Van Campen cannot show that he is faced with a real and substantial risk that his compliance with the Division's subpoena might tend to convict him of crime and 2) permitting Van Campen's blanket assertion of the privilege against self-incrimination, when it is not at all clear that the subpoena seeks testimony incriminating him, is wrongful. Accordingly, the Motion should be denied.

RESPECTFULLY SUBMITTED this 11th day of September 2008.

SECURITIES DIVISION of the
ARIZONA CORPORATION COMMISSION

Aaron S. Ludwig, Esq.
Staff Attorney

ORIGINAL and **13 COPIES** of the foregoing filed this 11th day of September 2008 with:

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